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SAVED BY THE BELL?
IS ONLINE, OFF-CAMPUS STUDENT SPEECH PROTECTED BY THE FIRST AMENDMENT?

ALISON HOFHEIMER*

I. INTRODUCTION

Schools are a unique and paradoxical environment in the context of First Amendment jurisprudence. The fundamental freedoms of speech and expression are important to the main goals of schools in that they facilitate learning, experience, communication, and expression, all of which contribute to the creation of a marketplace of ideas. Yet, in order to effectively promote these educational goals, schools must maintain order and protect children. Thus, public schools' regulation of online speech begs the question of what is in students' best interests and where the line should be drawn between (1) promoting expression and the creation of a school-wide marketplace of ideas and (2) protecting children and maintaining order. At what point are schools protecting children rather than infringing upon their vital fundamental rights? The Supreme Court has stated that students do not enjoy the same level of First Amendment protection as their adult counterparts because of the special characteristics of the school

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environment, which require schools to act as a custodian responsible for the school children.[1]

Technological innovation has significantly transformed the way that people of all ages communicate and express their views. The advent of the Internet, social media, and the like has created a new type of speech which differs dramatically from prior forms of speech, both in its accessibility and corresponding lack of privacy. Student speech cases from the late twentieth century reveal the difficulty courts face in attempting to strike a balance between protecting students' First Amendment rights and shielding children from the detrimental effects of disruptive student speech. The prominence of online student speech, which is typically created, shared, and accessed off-campus, has further exacerbated this precarious dilemma by obscuring schools' ability to regulate student speech. The uniquely pervasive nature of this speech has affected parents' and teachers' ability to monitor and control student speech, as well as protect children from its potentially detrimental effects.[2]

This Note analyzes the current state of uncertainty plaguing First Amendment jurisprudence, focusing on the questions implicated by the advent of student-created online speech, and it ultimately concludes that a modified version of the material and substantial disruption standard adopted in *Tinker v. Des Moines Independent Community School District*[3] is the best standard for deciding such speech cases. Part II discusses the evolution of Supreme Court doctrine regarding public schools' ability to restrict student speech, emphasizing the Court's increasingly restrictive, deferential trend. Part III explains why the Supreme Court's extremely limited holding in its most recent student speech case, *Morse v. Frederick*, has left lower courts without a discernible standard for online student speech cases, analyzing the various approaches used by lower courts grappling with this issue.[4] Part IV discusses potential solutions to the issue of regulating online student speech, explaining the various approaches and their likely implications.

II. THE EVOLUTION OF SUPREME COURT DOCTRINE: FROM PROTECTIVE TO DEFERENTIAL

Student speech jurisprudence has evolved and changed significantly over the last seventy years, with increasing challenges to new

1. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). Similarly, students do not enjoy the same level of Fourth Amendment protection in the context of searches conducted at school. Morse v. Frederick, 551 U.S. 393, 394 (2007); *see also infra* Part III.A.

2. *See Morse*, 551 U.S. at 424 (Alito, J., concurring).

3. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 *passim* (1969); *see also infra* Part II.A.

4. *See generally Morse*, 551 U.S. 393.

forms and modes of expression. In its early cases, the Supreme Court demonstrated a willingness to protect students' First Amendment rights unless a school was able to demonstrate a constitutionally valid and compelling reason for restricting those rights, maintaining that "[s]chool officials do not possess absolute authority over their students" because "state-operated schools may not be enclaves of totalitarianism."[5] In the last twenty-five years, there has been a dramatic departure from this protective viewpoint, with the Court showing an increasing willingness to restrict students' rights and defer to school officials' disciplinary decisions. However, these cases have been decided using a wide array of standards and lines of reasoning, generating much doctrinal ambiguity and making it difficult to determine what the controlling standard is for these types of cases. In the most recent student speech case, *Morse*, the student expression occurred in a unique setting, giving the Court the opportunity to both clarify the standard for traditional student speech cases and to expand on existing doctrine to incorporate new forms of communication, including online speech.[6] The Court avoided answering these difficult questions and decided *Morse* on extremely narrow grounds.[7] This further exacerbated the existing uncertainty surrounding students' First Amendment rights for both traditional and new forms of expression.

A. An Initially Protective View of Students' First Amendment Rights

The Supreme Court first addressed the issue of students' First Amendment rights in the context of laws and regulations requiring public school students to salute and pledge allegiance to the American flag.[8] The Court held that such laws and regulations unconstitutionally violated students' First Amendment protection against compelled expression or forced speech.[9] The Court's expansive view of students' First Amendment rights in this context suggested that it was willing to protect these rights in other school contexts, as well.

Less than three decades later, the Court articulated what has become the seminal standard for deciding student speech cases in *Tinker v. Des Moines Independent Community School District*.[10] The Court agreed with the district court and held that the "wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amend-

5. *Tinker*, 393 U.S. at 511.
6. *See* 551 U.S. 393 *passim*.
7. *See id.* at 409-10.
8. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (overruling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)).
9. *See id.* at 641-42.
10. *Tinker*, 393 U.S. 503.

ment."[11] The students were protesting the Vietnam War, and the Court determined that their action was "entirely divorced from actually or potentially disruptive conduct" and "was closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."[12] The Court reaffirmed that students (and teachers) enjoy First Amendment protection, despite "the special characteristics of the school environment," noting that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[13]

While firmly asserting that students enjoy First Amendment rights at school, the Court also stressed the need to strike a balance between competing interests.[14] It stated "[t]hat [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[15] The importance of protecting these constitutional rights must be balanced with "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[16] Thus, the issue in this case, and most subsequent school speech cases, is where to strike the balance between these competing, antithetical interests when school rules infringe upon students' exercise of their First Amendment rights.[17]

The *Tinker* Court indicated that striking such a balance should be based on the effect of the student speech rather than its message.[18] It concluded that student conduct that occurs "in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[19] The Court explicitly rejected the idea that school officials could regulate speech based on the content or message expressed, stating that school officials who restrict student expression "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an

11. *Id.* at 505 (affirming the district court's recognition that the students' actions qualified as protected symbolic speech).
12. *Id.* at 505-06.
13. *Id.* at 506.
14. *Id.* at 507.
15. *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
16. *Id.*
17. *Id.*
18. *Id.* at 508-10.
19. *Id.* at 513.

unpopular viewpoint."[20] Thus, whether student expression is protected primarily turns on the effect of that expression—whether it materially disrupts class work, involves substantial disorder, or invades the rights of others. Because the student expression in *Tinker* was not shown to have produced any of these prohibited effects, the students' expression was protected, and the school's disciplinary action was unconstitutional.[21]

In subsequent student speech cases, the Court continued to exhibit a protective, broad view of students' First Amendment rights. The Court held that a college could not engage in viewpoint discrimination by excluding a student group due to its views, even if the group advocated a destructive or violent philosophy.[22] Such speech was protected unless it was found to satisfy the legal standard for incitement, thus constituting dangerous speech.[23] Similarly, a college could not expel a student because he used coarse, vulgar language and drew a potentially offensive political cartoon in an off-campus underground newspaper.[24] The student's speech was protected because it was political speech expressed in an off-campus underground newspaper, and it did not violate other students' rights or cause a substantial disruption.[25] Similarly, the Court held that a school could not engage in viewpoint discrimination by removing books from its library merely because it disapproved of the ideas they expressed; however, books could be removed if they were obscene and vulgar.[26] The First Amendment, which prohibits the suppression of ideas, protects not only students' right to speak but also their right to receive information and access others' speech.[27] The Court continued affirmatively to protect students' First Amendment rights until 1986, when it retreated from its protective stance in *Bethel School District No. 403 v. Fraser*.[28]

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20. *Id.* at 509; *see also id.* at 510 (discussing that the school in this case acted in an attempt to "avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam"); *id.* at 511 (stating students "may not be confined to the expression of those sentiments that are officially approved").

21. *See id.* at 514.

22. *See* Healy v. James, 408 U.S. 169, 188-92 (1972).

23. *See id.* at 188 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (unanimous per curiam opinion)).

24. Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670-71 (1973).

25. *Id.*

26. *See* Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

27. *See id.* at 870-71.

28. 478 U.S. 675 (1986).

B. Retreating from Tinker *and Deferring to School Authority*

Beginning with *Bethel*, the Supreme Court has seemingly abandoned its protective view of students' First Amendment rights, demonstrating an increased willingness to defer to school authority for regulating student speech. In *Bethel*, a student was suspended for a speech he gave at a school assembly, in which he referred to the student he nominated for elective office using "an elaborate, graphic, and explicit sexual metaphor."[29] The Court upheld his suspension and distinguished the case from *Tinker* based on both the content of the speech and its effect.[30] It reasoned that, unlike the *Tinker* students' "nondisruptive, passive expression of a political viewpoint,"[31] this was sexually-charged, "offensively lewd and indecent speech," which was "unrelated to any political viewpoint."[32] Such speech is unprotected because it would "undermine the school's basic educational mission."[33] Additionally, the state has a long-recognized interest in protecting minors by shielding an unsuspecting audience from exposure to vulgar and offensive speech.[34]

Based on these findings, the Court held that the school was within its rights to punish the speaker based on its disciplinary code, which prohibited such speech and gave potential violators fair warning that uttering such words might warrant disciplinary action.[35] The Court noted that public school students' rights "are not automatically coextensive with the rights of adults in other settings."[36] Thus, the Court upheld this restriction on student speech based on both its offensive content and its effect in that it interfered with the rights of others.[37] The Court applied *Tinker* and found that this speech infringed upon the rights of others, but it also distinguished *Tinker* based on the nature of the speech at issue.[38] *Bethel* dealt with a student's sexual, offensive speech, while *Tinker* involved students' political speech;[39] thus, one justice explained that these cases were not entirely analogous based on the incongruent subject matter.[40]

Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court expanded upon its decision from *Bethel* and upheld public school officials' right to exercise editorial control over the contents of

29. *Id.* at 677-78.
30. *Id.* at 680.
31. *Id.*
32. *Id.* at 685.
33. *Id.*
34. *See id.* at 684-85.
35. *See id.* at 686.
36. *Id.* at 682.
37. *See id.* at 685-86.
38. *Id.*
39. *Id.* at 685.
40. *Id.* at 689 (Brennan, J., concurring).

a high school newspaper written and edited by the school's journalism class.[41] When presented with the proofs, the school principal prohibited two of the articles from being published because he objected to their content.[42] One was about the effect of divorce on Hazelwood students, and one was about three Hazelwood students' pregnancy experiences.[43] The Court determined that because the newspaper was a "supervised learning experience for journalism students" and not a forum for public expression, "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner."[44] Based on this finding, the Court determined that the issue was whether the First Amendment required public schools to affirmatively promote certain student speech, distinguishing it from the issue in *Tinker*, which was whether the First Amendment required public schools to tolerate certain political student speech.[45]

Thus, the issue was the scope of public schools' authority over school-sponsored publications, theatrical shows, and other expressive activities within the school's curriculum, such that the public may consider the message to be affirmatively promoted by the school.[46] Even if such activities occur beyond the boundaries of the traditional school setting, they are still considered part of the school curriculum if school officials supervise them and if they are intended to teach skills and knowledge to student actors and audiences.[47] Based on the nature of this category of expression, officials must have broad authority to ensure that the goals of such expression are achieved and to prevent the unintended negative consequences of this type of expression.[48]

The Court reasoned that schools must be allowed to set high standards for student expression conveyed through these types of school-endorsed channels, and that right includes the ability to refuse to endorse expression that falls short of such high standards.[49] Thus, it seems that schools have the right to dissociate themselves from such speech if it causes disorder or a substantial disruption, infringes on the rights of other students, or fails to meet the school's

41. *See* 484 U.S. 260, 276 (1988).
42. *Id.* at 263.
43. *Id.*
44. *Id.* at 270.
45. *See id.* at 270-71.
46. *See id.* at 271.
47. *Id.*
48. *See id.* ("Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.").
49. *See id.* at 271-72.

standards. This gives schools the broad ability to regulate and suppress speech deemed poorly written, insufficiently researched, grammatically unsound, biased or prejudiced, vulgar or obscene, or inappropriate for young audiences.[50] The Court, continuing its trend in deferring to school authorities, concluded that school officials do not violate students' First Amendment rights "by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[51] Thus, the Court held that the principal did not violate the students' rights because he had the authority to exercise such control, and his actions were reasonable.[52] By the end of the twentieth century, the standard for regulating on-campus student speech was clearly established, but the standard for deciding cases involving off-campus student speech remained unclear.

C. Morse v. Frederick: *A Missed Opportunity*

Morse presented the Supreme Court with a prime opportunity to resolve any uncertainties clouding First Amendment jurisprudence for student speech cases involving off-campus speech and to potentially provide guidance for a new subcategory of off-campus speech—online speech.[53] However, the Court exhibited extreme reluctance regarding the prospect of delving into new issues and delivered a very narrow holding, which did little to clarify the uncertainty plaguing lower courts deciding these cases.[54]

The circumstances surrounding the contested speech made this case unique. Several students displayed a large banner containing the phrase "BONG HiTS 4 JESUS" while standing across the street from their school watching the Olympic Torch Relay as it passed through town.[55] The torch relay occurred during school hours, but the school permitted its students and staff to leave class to participate in the relay from either side of the street in front of the school.[56] Meanwhile, school officials and teachers supervised the student participation.[57] Thus, the event was not school-related and did not physically occur within school boundaries, but it occurred during school hours, extremely near the school, and the audience consisted of many students and school faculty members.[58] Joseph Frederick, the student challenging the school's ability to suspend him for this speech, ar-

50. *See id.*
51. *Id.* at 273.
52. *See id.* at 274.
53. *See generally* Morse v. Frederick, 551 U.S. 393 (2007).
54. *See id.*
55. *Id.* at 397.
56. *Id.*
57. *Id.*
58. *Id.*

gued that this was not a school speech case since his speech did not occur at school.[59] While the Court noted that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents,"[60] the Court ultimately rejected Frederick's argument based on the following circumstances of the relay: it occurred during normal school hours, the principal approved it as a social event or class trip, school faculty members supervised the students, and the festivities included performances by the school's band and cheerleaders.[61] Thus, the Court treated Frederick's off-campus speech, which occurred beyond the school's physical boundaries, as though it was on-campus speech by classifying the relay as a school-sanctioned activity with adult supervision, effectively making it resemble typical student speech cases. This determination may not have ultimately affected the immediate outcome of the case, but it did enable the Court to avoid addressing the question of schools' authority to punish student expression that occurs off-campus (such as online speech).

After determining that this was indeed a student speech case, the Court analyzed the issue in the context of its past school speech decisions, distinguishing this speech from the speech addressed in its past decisions.[62] The Court stated that *Bethel* and *Hazelwood* both confirm that "the rule of *Tinker* is not the only basis for restricting student speech."[63] It rejected the dissent's argument that Frederick's speech was protected because it was political expression about the national debate over the criminalization of drug use and possession.[64] The Court dismissed both *Bethel* and *Hazelwood* as inapplicable—*Bethel* because the speech was not sexual or "plainly offensive"[65] and *Hazelwood* because "no one would reasonably believe that Frederick's banner bore the school's imprimatur."[66]

The Court's decision was based on its finding that the speech could be "reasonably viewed as promoting illegal drug use."[67] The Court held that the important government interest in deterring schoolchildren from using drugs, in light of the uniqueness of the school environment in which school officials are responsible for protecting children, justified the school's disciplinary action.[68] The prin-

59. *See id.* at 399-400.
60. *Id.* at 401.
61. *See id.* at 400-01.
62. *Id.* at 403-07.
63. *Id.* at 406.
64. *See id.* at 403.
65. *Id.* at 443 (Stevens, J., dissenting) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
66. *Id.* at 405 (majority opinion).
67. *Id.* at 409.
68. *Id.* at 407-08.

cipal acted immediately in response to Frederick's speech, knowing his actions would send an important message to the rest of the student body, and the Court concluded that his actions were reasonable given that Frederick violated well-established school policy.[69] Thus, the Court held that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers [of illegal drug use]."[70]

Some academics have asserted that *Morse* substantially expanded public schools' ability to regulate and restrict student speech, such that this decision may potentially equip schools with doctrinal justification for regulating online, off-campus student speech.[71] However, such a conclusion has proven to be at least partially inaccurate to date. The Court limited its decision tremendously by determining that the student's expression occurred at a school-sponsored event, thus satisfying the geographical nexus requirement.[72] Also, the Court concluded that the school's disciplinary action was justified by its policy against promoting illegal drug use.[73] The juxtaposition of these two findings severely narrows the scope of the Court's decision in *Morse*, making its applicability to future cases very limited. Additionally, both of these findings reveal that the Court in *Morse*, despite its refusal to address some of the potential implications of this decision, adhered to precedent in applying well-established standards for deciding First Amendment cases.

III. HOW LOWER COURTS ARE GRAPPLING WITH DOCTRINAL UNCERTAINTY: AN ANALYSIS OF LOWER COURT CASES INVOLVING POTENTIALLY "OFF-CAMPUS" SPEECH

While lower courts and scholars alike hoped that the Supreme Court would utilize *Morse* as an opportunity to clear the "doctrinal

69. *See id.* at 410.

70. *Id.*

71. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1055 (2008). See generally *Morse*, 551 U.S. at 425-47, for some of the dissenting Justices' expressions of similar concerns. See also *id.* at 426 (Breyer, J., dissenting), for Justice Breyer's specific fear that this decision could authorize increased viewpoint-based restrictions.

72. *See* Papandrea, *supra* note 71, at 1054-55. Had the Court not rejected the student's arguments and found that this was on-campus speech, it would have been forced to decide many of the questions that remain unanswered, such as what is the standard for determining whether speech is on-campus speech or not. *Id.*

73. *Morse*, 551 U.S. at 410. The Court concluded that the speech promoted illegal activity but did not say whether this constituted incitement. Such a finding would further support the Court's decision because it has traditionally held that the First Amendment does not protect speech aimed at inciting illegal activity. However, it is unlikely that the speech was substantially likely to cause imminent harm, the standard used in incitement cases. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

fog infecting student speech jurisprudence,"[74] the Court responded with an extremely limited holding that perpetuated or worsened the lingering ambiguity plaguing this area of law.[75] The effect of *Morse* on future student speech cases remains uncertain given that *Morse* was decided only five years ago, and the Supreme Court has not heard another student speech case since then. Most lower courts have decided recent student speech cases primarily based on the *Tinker* standard, despite the new issues implicated by student expression disseminated using modern technology.[76] These decisions do not rely heavily on *Morse*, which they note fails to provide guidance on the subject of how online speech should be treated by courts.[77] This Part explores some of the various approaches lower courts have used in deciding these cases, dividing them into two main categories—those that analyze the case using a traditional *Tinker* approach and those that apply *Tinker* only after making an important threshold determination about the geographic location from which the speech originated.[78]

A. Courts Applying Tinker *Regardless of Location of the Speech*

Many lower courts have decided student speech cases involving off-campus speech by simply applying the analysis from *Tinker*, treating that standard as controlling regardless of where the speech originated.[79] In *LaVine v. Blaine School District*, the Ninth Circuit was among the first to adopt such an approach, though this case predated *Morse* and the off-campus speech was not online speech.[80] The court held that the school was justified in expelling a student for writing a violent poem that described killing his classmate.[81] The student brought the poem to school and showed it to several classmates and a teacher.[82] Despite that the poem was written off-campus in the student's free time and had no connection to any school assignment or activity, the court analyzed the speech based on *Tinker*, without giving any weight to the poem's disconnect from the school or

74. Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 875 (2010) (quoting Bill Mears, *High Court Hears 'Bong Hits 4 Jesus' Case*, CNN (Mar. 19, 2007), http://www.cnn.com/2007/LAW/03/19/free.speech/index.html? iref=newssearch).

75. *See* Papandrea, *supra* note 71, at 1053-58 (discussing the doctrinal uncertainty after *Morse* and how lower courts are dealing with such).

76. *See id.* at 1056-58.

77. *See id.* at 1053-58.

78. *See* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1103-04 (C.D. Cal. 2010) (discussing various courts' use of these approaches).

79. *See id.* at 1103.

80. *See generally* LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001).

81. *Id.* at 983.

82. *Id.* at 984.

its off-campus origins.[83] The court implied that the geographical origin of the poem was immaterial because *Tinker* applied to both on-campus and off-campus speech alike.[84] Given that the student brought the poem to school himself and showed it to students and a teacher, the court concluded that the school reasonably concluded that the poem would cause a substantial disruption of the school's activities, which justified the school's decision to punish him for his speech.[85] Similar reasoning has been used in some of the other circuits, including cases regarding online speech.

The Eighth Circuit has adopted a similar approach for deciding these cases. In *D.J.M.* ex rel. *D.M. v. Hannibal Public School District No. 60*, the court upheld a school's suspension of a high school student for sending instant messages to a classmate discussing getting a gun and shooting students at school.[86] The court distinguished this case from previous student speech cases heard by the Supreme Court because, in this case, the student threatened violence and his expression did not occur during school or a school-sanctioned event.[87] However, the Court still found that *Tinker* was the controlling standard because the *Tinker* Court specifically explained that the material and substantial disruption standard applied "in class *or out of it*."[88] The court found that it was reasonably foreseeable that the student's speech would cause a material and substantial disruption within the school environment, and the speech did, in fact, have such an effect.[89] Thus, the school's actions were justified both on those grounds and because of the nature of instant messaging, which enables rapid communication both in and out of school. It explained that while schools cannot actively seek to find, monitor, and restrict such out-of-school speech, when it is brought to their attention they must respond quickly and decide how to act to ensure school order.[90] Thus,

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83. *Id.* at 989 (reasoning that because the speech did not fall into the categories governed by *Fraser* or *Hazelwood* in that it was neither vulgar and offensive speech nor school-sponsored speech, it must be governed by *Tinker,* which was the third, all-inclusive category).

84. *Id.*

85. *Id.*

86. 647 F.3d 754, 756-57 (2011).

87. *Id.* at 761.

88. *Id.* at 765 (emphasis added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)). It is unclear exactly what the Supreme Court was referring to when it said "or out of it," *Tinker*, 393 U.S. at 513; however, it seems as though this actually refers to expression that occurs on-campus during school activities taking place outside of the classroom. This interpretation seems more accurate than the Eighth Circuit's, because in the sentence preceding this quotation, the Court explained that students' First Amendment rights continue to exist while on the playground, cafeteria, etc., which are school activities that take place on the school's physical campus but outside of the classroom. *Id.* at 512-13.

89. *Hannibal*, 647 F.3d at 766.

90. *Id.* at 765.

the Eighth Circuit is extremely deferential to school authority in these types of cases.

B. Courts Applying a Tinker*-Hybrid Approach: Applying the Substantial Disruption Standard After a Threshold Geographic Nexus Determination*

Other courts have held that the location of the speech, be it the literal geographic location or a forged nexus created by the speech's connection to the school, is an important threshold issue that courts must address before applying *Tinker*.[91] The Seventh Circuit was among the first to use such an approach, applying it to a case involving an underground student newspaper. It held that schools can regulate speech that originates off-campus when it makes its way within school boundaries in a meaningful way.[92]

The Second Circuit has adopted a similar approach, applying it to online student speech cases. In *Wisniewski v. Board of Education*, the court upheld the school district's suspension of a student who used America Online instant messaging to transmit a drawing of a teacher being shot.[93] It explained that determining whether there was a nexus between the school and the student's off-campus speech was necessary because "[t]he fact that [his] creation and transmission of the [instant message] icon occurred away from school property does not necessarily insulate him from school discipline."[94] The court determined that even though the student created and shared the drawing using his home computer during after-school hours, "it was reasonably foreseeable that the IM icon would come to the attention of school authorities" and that it might cause a substantial disruption in school activities.[95] Thus, the threshold determination regarding the geographic location of speech is not solely based on where the speech was created. If the nature of the speech connects it to the school, such that the risk of it causing a substantial disruption of school activities is reasonably foreseeable, then there is a sufficient geographic nexus between the speech and the school to warrant the application of *Tinker*.[96] Here, since the nexus requirement was satisfied, the court concluded that based on *Tinker* the school's disciplinary action was justified, and its restriction of online off-campus speech was permissible.[97]

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91. *See* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1104-06 (C.D. Cal. 2010).
92. Boucher v. Sch. Bd., 134 F.3d 821, 828-29 (7th Cir. 1998).
93. *See* 494 F.3d 34, 35 (2d Cir. 2007).
94. *Id.* at 39.
95. *Id.*
96. *See id.* at 38-40.
97. *Id.* at 40.

The Second Circuit decided a later student speech case involving online off-campus student speech using this same approach. In *Doninger v. Niehoff*, the court held that a high school was justified in prohibiting a student from running for class office due to her Internet blog, which she created from her home computer during non-school hours.[98] The blog harshly criticized school officials' decision to cancel an event called "Jamfest."[99] The court determined that the threshold geographic nexus had been met because the expression contained in the blog directly implicated school activities and encouraged classmates to read and respond to it (which they did).[100] The court concluded that it was reasonably foreseeable that the blog would come to the school's attention, disrupt school activities, and interfere with the school's attempts to resolve the ensuing conflict that the blog depicted.[101] This finding was based on the nature of the blog, the language used, and the information contained therein, which the school claimed was inaccurate and misleading.[102] Thus, despite the fact that the blog was not sexual, offensive, violent, or threatening, the court found that the blog unquestionably satisfied *Tinker's* material and substantial disruption standard, and the school was justified in punishing the student.[103]

The Fourth Circuit has analyzed online student speech cases in the same manner as the Second Circuit, determining the location of the speech before proceeding to the *Tinker* analysis. In *Kowalski v. Berkeley County Schools*, the school suspended a high school student who used her home computer during after-school hours to create a Myspace[104] group attacking a classmate.[105] The group was named "S.A.S.H.," which allegedly stood for either "Students Against Sluts With Herpes" or "Students Against Shay's Herpes."[106] The court found that there was a sufficient nexus between the speech and the school's pedagogical goals in protecting its students from such assaultive speech.[107] It explained that this nexus was reinforced by the fact that the student knew her speech would be accessed beyond her home and knew the likely effect the speech would have, such that it

98. 642 F.3d 334, 338 (2d Cir. 2011).
99. *Id.* at 340-41.
100. *Id.* at 348.
101. *Id.*
102. *Id.*
103. *See id.* at 349.
104. Myspace is a social media website. Its "About Myspace" page describes it as "a place where people come to connect, discover, and share . . . [w]ith roots in music and social, the platform is built to empower all artists—from musicians and designers to writers and photographers—helping them connect with audiences, collaborators, and partners to achieve their goals." *About Myspace*, MYSPACE, https://myspace.com/pressroom/aboutmyspace (last visited July 6, 2013).
105. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 567 (4th Cir. 2011).
106. *Id.*
107. *See id.* at 573.

was reasonably foreseeable that her speech would permeate the school's boundaries and affect school activities.[108] The court applied *Tinker* and found that the student's speech both disrupted school activities and interfered with other students' rights, namely those of the girl targeted by the speech.[109] The court further reasoned that schools can regulate off-campus speech that enters and impacts the school in a significant way.[110] It refused to limit schools' ability to protect their interest in order, discipline, and safety by confining schools' authority to the physical boundaries of their campuses.[111]

The Third Circuit used a similar approach in *Layshock* ex rel. *Layshock v. Hermitage School District*, explaining that schools can punish off-campus student speech the same way they punish on-campus speech, but only if the speech resulted in a substantial disruption of school activities.[112] Thus, under this approach, the court must determine whether the speech occurred off-campus before it asks whether the speech caused a disruption.[113] This high school student was suspended for ten days after using his home computer to create a fake Myspace profile mocking his principal.[114] In this case, however, the court rejected the school's argument that because the student's profile mocked the principal, he had entered the school, effectively making his speech on-campus speech.[115] The court found that the speech did not create a foreseeable, substantial disruption; therefore, the school district lacked the authority to punish the student for his online off-campus speech merely because it was lewd and offensive.[116] In reaching this holding, the court specifically stated that *Bethel* was inapplicable to speech that "occurred outside the school context."[117] Thus, the Third Circuit has adopted a more protective stance regarding students' First Amendment rights, stating that "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[118]

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108. *See id.*
109. *See id.* at 573-74.
110. *Id.* at 574.
111. *See id.*; *see also* Morse v. Frederick, 551 U.S. 393, 401 (2007). The Supreme Court noted the uncertainty of the outer boundaries and scope of applicability of school speech precedents, but it refused to determine what those outer boundaries were. *Morse*, 551 U.S. at 401.
112. 650 F.3d 205 (3d Cir. 2011) (en banc).
113. *See id.* at 216.
114. *Id.* at 207, 210.
115. *See id.* at 219.
116. *See id.*
117. *Id.*
118. *Id.* at 216.

Notably, the Supreme Court declined to hear *Layshock* and other similar cases in January of 2012, leaving the lower court's decisions in place.[119] Thus, the Supreme Court again refused to clarify this area of First Amendment jurisprudence, declining to hear another off-campus online student speech case and leaving the lower courts without any guidance for resolving such issues.[120]

C. Lower Court Decisions: In General

Despite the varied approaches used by lower courts in deciding off-campus student speech cases, the outcomes are surprisingly consistent. The courts apply *Tinker* and assess whether the student speech caused a material and substantial disruption in school activities or whether the risk of creating such was reasonably foreseeable. If that determination is answered in the affirmative, the courts generally defer to the schools and uphold their restriction on speech. The cases described above tend to show that the more violent and offensive the student speech, the more likely the court is to find that it either caused or posed a reasonable risk of causing a substantial disruption. The one case in which the court found for the student involved a fake Myspace profile, which although mildly offensive did not create such a disruption.[121] Thus, the question seems to be about the potential or actual effects of the speech, which is much more focused on the nature and content of the speech than the location from which it originates.

Lower courts have grappled with the issue posed by online, off-campus student speech cases, attempting to adhere to Supreme Court precedent as much as possible given the Supreme Court's silence on this increasingly salient issue. Most courts have applied some variation of the *Tinker* material and substantial disruption standard, with most incorporating an additional threshold geographic nexus or discussing other case law and factors in their decisions. The outcomes have varied, but there is a worrisome continuing trend within the Supreme Court (in earlier student speech cases) and the lower courts as both increasingly defer to school authority figures' decisions on these issues, blindly upholding them regardless of the repercussions for students' First Amendment rights. Whether or not this is the optimal result, there is an increasingly dire need for Supreme Court guidance on this issue as courts attempt to apply a

119. *Id.*; Blue Mountain Sch. Dist. v. J.S. *ex rel.* Snyder, 132 S. Ct. 1097 (2012) (denying cert.).

120. *See* Kim Watterson & Vic Walczak, *Layshock v. Hermitage School District*, ACLU OF PA., http://www.aclupa.org/legal/legaldocket/studentsuspendedforinterne.htm (last visited July 6, 2013).

121. *See supra* notes 112-18 and accompanying text.

standard that was formulated over forty years ago, long before the advent of these technological innovations.

IV. POTENTIAL SOLUTIONS

It is evident that the lower courts need the Supreme Court to clarify this area of First Amendment jurisprudence, but questions pertaining to how the Supreme Court should decide this issue and what is the best solution are far less evident. This Note concludes that the best way to resolve the current state of uncertainty is a multi-faceted, comprehensive approach comprised of clear Supreme Court guidance, legislative action, school action, and parental action, which are all discussed in this Part.

A. How Courts Should Decide Online Off-Campus Speech Cases

Initially, the territorial approach used in several of the circuit courts[122] would seem preferable to that of the courts that merely apply *Tinker*, in that the territorial approach at least acknowledges that there is a difference between off-campus speech and speech that occurs physically on-campus. However, some critics argue that the territorial approach gives schools too much authority generally to restrict student speech by allowing regulation whenever it is either directed at the school or it is reasonably foreseeable that the speech may come to the school's attention.[123] Courts using this approach have fairly reasoned that if there is no connection to the school, school officials lack the authority to regulate the speech.[124] However, it seems as though nearly every court finds the requisite connection, so this standard practically guarantees that the court will uphold the school's decision to restrict student expression and acts as a rubber stamp for these cases.[125] Thus, they claim that this approach couches courts' deference to schools' authority in terms of a moot preliminary determination used to justify non-justifiable school actions.[126]

These same critics also reject the alternate approach, when courts use solely *Tinker* to decide off-campus student speech cases,[127] arguing that "the *Tinker* test is ill-suited to speech in the digital media."[128] Proponents of this argument claim that using *Tinker* enables schools

122. *See infra* Part III.B.
123. *See* Papandrea, *supra* note 71, at 1102.
124. *See id.*
125. *See id.* at 1090-92. *See also* Renee L. Servance, *Cyber-bullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1224 (arguing that "geographic distinction is no longer appropriate as a dispositive element in school speech cases").
126. *See* Papandrea, *supra* note 71, at 1090-91.
127. *See id.* at 1102.
128. *See id.*

to use "standardless discretion"[129] to prohibit effectively any speech of which they disapprove, especially when it is controversial or undesirable speech.[130] As one critic explained, "[t]his approach threatens to grant schools virtually unlimited authority to restrict student expression because it is arguably foreseeable that virtually any speech that concerns the school, its personnel, or its students will come to the attention of school officials."[131] The fact that a student's speech came to her school's attention or may potentially distract other students should not enable the school "to serve as a cultural censor."[132] The Court has specifically stated that schools cannot restrict student expression merely because they dislike the message, applying ad hoc content-based restrictions on speech.[133] Yet, courts using this approach are enabling schools to do precisely that. Thus, those who advance these arguments are unsatisfied with both of the approaches used by the lower courts in deciding online, off-campus student speech cases.

The Supreme Court needs to affirmatively resolve this gap in First Amendment jurisprudence by promulgating a standard for deciding the scope of schools' authority to regulate off-campus student speech in general. Ideally, the Court should address the new questions implicated by online off-campus student speech specifically, but at a minimum, it should address schools' rights pertaining to off-campus speech in general. Online speech may even be deemed so unique that the Court should specifically tailor a standard for deciding such cases rather than formulating a general rule.

If the Court endeavors to decide a case involving off-campus online student speech, an important factor it should consider is the difference between the Internet and other modes of communication. In *Reno v. ACLU*, the Court discussed the differences between the Internet and other forms of communication in determining whether the Communications Decency Act was constitutional.[134] The Court noted that "[u]nlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve mate-

129. *Id.* at 1092.
130. *Id.* at 1092-94.
131. *Id.* at 1102.
132. *Id.*
133. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (stating that schools cannot restrict student speech based solely on a "desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint"); *id.* at 510 (prohibiting schools from restricting speech merely to "avoid the controversy which might result from the expression").
134. 521 U.S. 844 (1997).

rial and thereby to use the Internet unattended.' "[135] Thus, the Court reasoned that publishing information on the Internet does not create the same problems created by radio and television broadcasting, in that the Internet is less invasive since people must affirmatively act to receive such information.[136] Because one must deliberately seek out online speech, the only way for it to enter schools is by someone bringing it to campus, either by bringing a hard copy to school or accessing it on the Internet while at school.[137] The Court also noted that the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds."[138] Given the minimally intrusive nature of the Internet and its ability to promote self-expression and contribute to the marketplace of ideas, the Court should protect students' First Amendment rights and establish the narrow circumstances that warrant school regulation of students' online, off-campus speech.

The most appropriate standard for these cases would be one similar to the "clear and present danger" test articulated in Justice Holmes's famous dissent from *Abrams v. United States*,[139] which was later adopted by the majority in *Brandenburg v. Ohio*.[140] Such a test would be similar to the *Tinker* material and substantial disruption standard in that it would enable schools to regulate student speech based on the speech's ability to cause a substantial disruption. However, the clear and present danger test is a stricter standard than *Tinker* because it requires that the speech creates a readily apparent danger, not merely a reasonably foreseeable risk of danger at some unknown future time.[141] Justice Holmes reasoned that this standard was appropriate because maintaining the marketplace of ideas is so important to the functioning of a democratic society that the government's ability to suppress speech should be limited to situations in which there is an immediate danger that must be curtailed.[142] The Court's justification for such a standard should apply with equal force to student speech cases because schools are supposed to facilitate the creation of a marketplace of student ideas. Thus, the Court should apply a similar standard to student speech cases, especially when the speech occurs off-campus.

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135. *Id.* at 854 (quoting ACLU v. Reno, 929 F. Supp. 824, 845 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997)).

136. *Id.* at 869.

137. Schools can prevent students from accessing the Internet at school by installing filtering software on their computers. *See* King, *supra* note 74, at 882-83; *see also infra* Part IV.B.2.

138. *Reno*, 521 U.S. at 870.

139. 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

140. *See* 395 U.S. 444 (1969).

141. *See Abrams,* 250 U.S. at 624-31.

142. *See id.*

B. Other Solutions

1. Legislative:

While legislation alone would likely be inappropriate and ill-suited for regulating the general dilemma posed by online off-campus student speech, specific, well-crafted legislation may be a plausible solution for certain limited areas. For example, the use of legislation may be well-suited to address the increasing problem of cyber-bullying. Legislation may be well-equipped to regulate this form of online, off-campus student speech,[143] as evidenced by the increasing efforts of students, parents, schools, and Congress to implement such laws.[144] Such legislation would be difficult to pass if the Supreme Court ruled that schools lack the authority to regulate online off-campus student speech,[145] but in light of the recent lower court decisions addressing this issue,[146] such a result seems improbable.

Historically, legislation has been used to regulate the publication and dissemination of indecent, lewd, obscene, and offensive materials.[147] Such legislation applies with equal force to online off-campus student speech that falls into this category and is well-suited to deal with that type of speech.

Thus, legislation that is specifically tailored to regulate certain types of student speech is a proper supplemental solution for regulating online off-campus student speech. However, legislation alone could not plausibly address the numerous and wide-ranging questions plaguing this area of law without implementing some form of overbroad, bright-line rule. Such legislation would be undesirable in this context because it would give school authorities too much discretion.

2. Schools:

Schools enjoy an arsenal of diverse strategies that they could use to try to decrease or prevent the dissemination (both on-campus and off-campus) of the types of speech that have been restricted in student speech cases. Many schools use filtering software to block undesirable web sites from school computers.[148] This prohibits students from accessing these sites and the student speech contained there-

143. This dangerous activity may also be engaged in by non-students, but since it is most problematic within the context of schools, a discussion of the potential for non-student participants is beyond the scope of this Note.

144. *See generally* King, *supra* note 74 (noting the many lobbying efforts of parents and schools to encourage Congress to adopt such legislation).

145. *See id.*

146. *See* discussion *supra* Part III.

147. *See generally* Roth v. United States, 354 U.S. 476 (1957) (upholding a state obscenity law and explaining that obscenity is a category of unprotected speech).

148. *See* King, *supra* note 74, at 882-83.

in.[149] As a result, students' use of the sites may potentially decrease, but more importantly, this effectively prevents students from bringing off-campus speech into schools, decreasing the ability of such speech to create a substantial disruption in school activities. Although students could still bring that speech to school by either bringing a hard copy of it or using their smart phones—activities that can also be regulated by the school—students' ability to access the speech at school is still limited by this strategy.

The most effective and comprehensive solution is for schools to do exactly what they are designed to do—educate people. Schools should educate both parents and students on a wide variety of issues posed by the Internet, including cyberbullying, Internet safety, dangers of the Internet, potential negative ramifications of posting indecent pictures or offensive speech, and more. They should similarly educate parents and students about tolerance, etiquette, civility, and positive forms of expression. Schools should not only educate parents but also encourage them to educate, monitor, and punish their children accordingly. Educating parents and students about these issues is a potentially thorough and effective way to deal with the problems created by online speech. This is also a desirable approach because it lacks the detrimental effects of many other solutions in that it is unlikely to chill speech or inhibit student expression.

Another way schools can decrease, if not prevent, the instances of damaging student speech is by implementing and enforcing disciplinary policies, academic standards, and other school regulations designed to specifically address the issue at hand. When such regulations are narrowly tailored to the specific problem they aim to address, and school officials make them widely known, the students have fair notice of the parameters of acceptable online speech and can navigate within them accordingly. Ideally, by narrowly tailoring rules and promulgating specific guidelines for what is and is not acceptable, students are more likely to abstain from "deviant" behavior because they know the rules. Similarly, making students acutely aware of the potential ramifications deters much of the contested student expression because it forces students to weigh the costs and benefits of their actions before they act.

3. Parents:

Parents, even more so than schools, occupy the ideal position to promote positive online expression and discourage that which might be considered problematic. Parents should educate their children about the proper use of the Internet (and other technology like smart

149. *Id.*

phones) and the potential consequences for their misuse. They should address this issue early on, providing their children with accurate and reliable information to counteract the information received by peers and other sources of information. Similarly, parents should implement their own guidelines or rules for using technology and discipline their children appropriately for violating them.

In nearly all the cases that dealt with the issue of off-campus student speech, the speech at issue was created and disseminated from the students' home computers. Given this recurring theme, parents seem especially well-suited to address the issue of online speech. Additionally, parents are in a better position than schools to monitor and supervise their children's activities and punish them accordingly. Parents may also choose to be proactive and use filtering software on their home computer.

Parents may be the most effective and comprehensive solution to the problem of regulating online off-campus student speech because they can monitor and restrict most, if not all, avenues of expression. Parents control whether their children have a smart phone and other similar forms of technology that provide children with additional access to the Internet and could potentially enable students to circumvent school or family rules regulating computer usage.

The prevalence of online off-campus student speech cases will likely decrease dramatically if students are educated and discouraged from creating online speech that is potentially problematic, whether it be violent in nature, assaultive towards fellow students or school officials, or otherwise disruptive.

V. CONCLUSION

In the centuries since the First Amendment was written, many new forms of expression have emerged and become increasingly prevalent, presenting the Supreme Court with various opportunities to determine how the First Amendment applies to these new channels. Younger generations tend to enthusiastically embrace technological innovations, a trend that is evidenced by children's use of the Internet, smart phones, and other similar technology. In the digital age, most students express themselves primarily through electronic means, which seem to have replaced the use of pens and paper.

Digital expression plays a crucial role in students' lives, but technology is a paradoxical, double-edged sword in the twenty-first century. The Internet and smart phones abound with expressive possibilities—students can communicate with others, express themselves, and publish their expression instantly. The Internet promotes the quintessential "marketplace of ideas" and realization of democratic ideals by enabling students to receive endless information and edu-

cate themselves on a wide variety of issues so that they may filter information and form their own opinions. Yet, the benefits of the Internet are accompanied by many potentially detrimental consequences.

When student expression is brought to school, it can disrupt school activities by violating the rights of other students, threatening the school's ability to maintain order, and undermining the school's educational mission. Thus, the paradoxical nature of schools requires a balancing of competing interests, leaving courts with a troublesome dilemma—where does one draw the line between promoting the creation of a marketplace of ideas, learning, and expression versus maintaining order and discipline in schools so that they can fulfill their educational missions?

The Supreme Court theoretically drew that line over forty years ago when it decided *Tinker v. Des Moines Independent Community School District*[150] and promulgated the standard for student speech cases. The *Tinker* standard, under which schools may regulate student expression when it causes a substantial and material disruption of school activities or infringes upon the rights of others,[151] is still being applied today but in the new, unanticipated context of online student speech cases. The Supreme Court needs to answer affirmatively the question of whether schools can regulate off-campus student speech, and, if so, the Court should create a clear standard for determining whether and when speech is "off-campus" speech. The significant differences between the types of speech being regulated today and the speech at issue in *Tinker* reveal the need to reevaluate that case and determine whether it is the appropriate standard for this unprecedented issue.

Courts have increasingly deferred to schools in student speech cases, and the future of students' First Amendment rights have been undeniably jeopardized. The Supreme Court has conceded that children's First Amendment rights are not necessarily co-extensive with that of adults.[152] Yet, it has also repeatedly emphasized that children do not shed their First Amendment rights at the schoolhouse gate.[153] As courts continue to erode students' First Amendment rights both on and off campus, one cannot help but wonder how much further the Supreme Court will let lower courts diminish these rights before it steps in and, hopefully, reinvigorates them. Until then, one question remains unresolved—have students been forced to shed their rights at the keyboard, as well as at the schoolhouse gate?

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150. 393 U.S. 503 (1969).
151. *See id.* at 505.
152. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
153. *See Tinker*, 393 U.S. at 506.